

(2009) 01 DEL CK 0312

In the Delhi High Court

Case No : Writ Petition (C) No. 4123 of 2007

Dr. Indira Sarnath

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-01-2009

Acts Referred:

Citation : (2009) 01 DEL CK 0312

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : P.V. Kapur, Radha Rangaswami, Prachi Vasisht and Amit Sibal, for the Appellant; V.S.R. Krishna, for the Respondent

Final Decision : Dismissed

Judgement

Vipin Sanghi, J.—The present writ petition is directed against the order dated 22.5.2007 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short "The Tribunal") whereby the petitioner's Original Application bearing OA No. 2612/2006 and the various miscellaneous applications filed by her have been disposed off by the Tribunal. The Tribunal has dismissed the aforesaid O.A filed by the petitioner. The petitioner had preferred the aforesaid OA to seek the quashing and setting aside of two orders passed by the respondents, both dated 6.12.2006 promoting, inter alia, respondent No. 6 as Chief Medical Directors (CMD, for short) in Higher Administrative Grade (HAG, for short), and posting respondent Nos. 3 to 5 and 7 to 9 as CMD in Senior Administrative Grade (SAG, for short), and for a direction to the respondent authorities to promote the petitioner as CMD(HAG) with consequential benefits.

2. The petitioner was recruited to Indian Railway Medical Service(IRMS, for short) in 1972. She was promoted as Assistant Medical Officer (AMO), Additional Divisional Medical Officer (ADMO) and then as Divisional Medical Officer (DMO). She was further promoted to Senior Administrative Grade (SAG) in the year 2002 w.e.f. 20.10.2000. The next high grade is CMD (HAG). She was considered for promotion as CMD (HAG) and also for the various down graded posts of CMD in

SAG but she has been denied promotion to CMD(HAG) and posting as CMD (SAG) by the respondent authorities. Respondent No. 6 has been promoted as CMD (HAG) whereas the other private respondents have been posted as CMD (SAG).

3. The case of the petitioner before the Tribunal was that in the year 2002 when she was considered for promotion to the post of SAG, her record upto the year 2000 was considered. She submits that she definitely had a grading of "Very Good". That is why she was promoted to SAG. However since the year 2001, after her promotion to the post of SAG she had been subjected to frequent transfers. Her ACRs were written by several officers. There was no communication from the Railway Board or any other authority indicating that there had been a fall in her grading of ACRs which would disentitle her for future promotion. As per the brochure of the Railway Board pertaining to confidential reports, and the writing of ACRs, the fact of fall in the grading requires to be communicated. The fact that she was never communicated any adverse remarks in her confidential reports goes to show that she was fit for promotion. If any grading is lower than the minimum required for promotion i.e the benchmark for promotion, the same has to be considered as adverse and has to be communicated to the concerned officer. Since no adverse remarks has been communicated, if she has been graded "Good" or below, the same has to be ignored on account of its non-communication. Her further case was that her immediate superior who wrote her ACRs is the DRM, who is an officer in the same grade as the Petitioner. The DRM is a non Medical Officer. It is not possible for the DRM to assess the performance of a Medical Officer. She also apprehended that on account of her being a tough task master, she might have incurred the displeasure of her colleagues and subordinates. For this reason her ACRs might not have been properly recorded on account of the biased attitude amongst her superiors during the period 2003-2005. She further submitted that her juniors, who were due to retire within a short span of time were posted as CMD(SAG). The post of CMD was down graded to SAG from HAG to accommodate such persons. The petitioner also submitted that the down grading of the various posts of CMD (HAG) to CMD(SAG) was improper. It was contended that the respondent authorities while down grading the said posts of CMD(HAG) had failed to establish expediency for such down grading in public interest, and had not consulted DOPT before such down grading. Her further grievance was that the Selection Committee was not constituted in accordance with the Resolution dated 28.3.2000 of the Railway Board, in as much as the said Resolution required that a functional member should be a member of the Selection Committee, especially when the Chairman, Railway Board is also a functional member. Her grievance was that the Railway Board does not consist of any member from IRMS and the Chairman, Railway Board is also not from IRMS. Consequently the Selection Committee did not consist of a functional member dealing with officers of IRMS. As there is no member (Medical) in the Railway Board, the head of the IRMS i.e. Director General, Railway Health Services (DG,

RHS) should have been associated with the Selection Committee. It was contended that the process of selection and appointment as CMD was not transparent. She further contended that the method of writing ACRs for the petitioner was wrong, as during the five years from 2002-2006, she had served in five different assignments and her ACRs were written by different officers from various divisions in different zones. She complained that there was no Central Monitoring Authority to assess her work in so far as it involved varied responsibilities in different situations. The procedure of assessment of ACRs by the Selection Committee was also not transparent according to the petitioner. She sought the production of the ACRs of the petitioner as well as respondent No. 3 to 9 before the Tribunal for its own perusal along with the records of the Selection Committee and its recommendations for promotion to the post of CMD (HAG) and posting as CMD (SAG).

4. The stand of the official respondents before the Tribunal was that the Competent Authority had assessed the performance of all eligible officers including the petitioner at the time of preparation of the panel for HAG of IRMS officers. However, some of the officers including the petitioner were not recommended for promotion to HAG as they did not meet the benchmark of VG+ as stipulated in the circular dated 03.06.2002. The officers who were recommended for promotion to HAG were promoted vide Railway Board's letter dated 6.12.2006. No officer junior to the petitioner had been promoted to HAG vide the first order dated 6.12.2006. So far as the other order dated 6.12.2006 relating to posting of SAG officers of IRMS as CMD in SAG is concerned, the same does not amount to a promotion. It is further stated that the down grading of certain HAG posts of CMD to SAG was done by the Competent Authority to meet administrative exigencies and in public interest. As and when officers empanelled in HAG become available, these posts would be upgraded to HAG. It was further stated that even for posting against the down graded post of CMD, the performance of the officers including that of the petitioner was taken into account.

5. The official respondents further stated that there are nine organized Grade "A" services in the Indian Railways, including IRMS. There are various other services/departments such as Security, Legal, Printing and Stationery etc. There are seven members of Railway Board headed by the Chairman. Their pay is Rs. 26,000/- fixed. Member (Staff) an Ex-Officio Secretary to Government of India has control over the following services/departments: Personnel, Medical, Security, Law, Vigilance, Official Language etc. It was further disclosed that there are two posts of Director General/Railway Health Services and Director General/Railway Protection Force in the Railway Board. Their pay is also Rs. 26,000/- fixed like that of the members of the Railway Board, but they are neither members of the Railway Board nor do they have the status of member and Ex-Officio Secretary to Government of India. These Director Generals report to Member (Staff). The Departmental Promotion Committee(DPC) for promotion to, inter alia, Senior Administrative Grade (Rs. 18,4000-22,400) consists of all the

members of the Railway Board as per the letter dated 26.9.1989, amended on 3.6.2002. According to the respondent the letter dated 26.9.1989 was an adoption of DOPT OM dated 10.4.1989 relied upon by the petitioner. For consideration for promotion of the IRMS officers, there is no member from Medical Department on the DPC. The petitioner was considered for promotion to SAG by the DPC, namely, the members of the Railway Board and was promoted as such. The DPC for promotion to HAG (Rs. 22,400-24,500) comprises of members as laid down in the Resolution dated 28.3.2000 i.e. the Chairman Railway Board, Secretary/DOPT and one member of Railway Board. In the case of promotion to HAG of IRMS, the 3rd member is member (Staff). The Resolution dated 28.3.2000 was framed and issued with the approval of DOPT. The respondent, therefore, submitted that the contention of the petitioner that the DPC for promotion to HAG from amongst the IRMS officers had not been constituted as per DOPTs guideline was wrong. The DG, RHS not being a member of the Railway Board, he cannot be made the functional member in the DPC which considers the promotion of IRMS officers to HAG. The respondents further submitted that the letter dated 3.6.2002 does not state that the DPC can go outside the ACRs and make its own assessment. What has been stated is that the DPC is not merely guided by the grades recorded in the ACRs but makes its own assessment on the basis of the various entries in the ACRs including pertaining to several parameters and attributes. The respondent relied upon the decision of the Supreme Court in Dalpat Abasaheb Solunke and Others Vs. Dr. B.S. Mahajan and Others, wherein the Supreme Court had held that it is not the function of the Court to hear appeals against the decision of the Selection Committees and to scrutinize the relative merit of the candidates. Whether a candidate is fit for a particular post or not has to be decided by the duly constituted Selection Committee which has the expertise in the subject. The Court has no such expertise. The decision of the Selection Committee can be interfered with only on limited grounds, such as illegality or patent material irregularity in the constitution of the Committee or its procedure violating the selection norms etc.

6. Based on the procedure laid down in the aforesaid circular dated 3.6.2002 it was submitted by the respondent authorities that the DPC was not merely guided by the grades recorded in the ACRs but it had to make it own assessment on the basis of various entries in the ACRs including several parameters and attributes.

7. The respondent authorities submitted that the Resolution dated 28.3.2000 and Circular dated 3.6.2002 were founded upon O.M. dated 10.4.1989 of DOPT, and in conformity with it. The respondents produced the seniority list of SAG officers dated 12.4.2002 to dispute the claim of the petitioner that Dr. Krishan Kumar, respondent No. 6 is junior to the petitioner. Dr. Krishan Kumar was placed at Sl. No. 55 (having being promoted to SAG w.e.f. 28.07.2000), as opposed to the petitioner's placement at Sl.No.62 (having been promoted to SAG w.e.f. 20.10.2000) in the said seniority list. The respondent authorities defended the system of writing the ACR. The same had been evolved over a period of time and

had stood the test of time. The 3-tier system of recording ACRs eliminates the element of bias. It was submitted that even though the DRM is in the same grade as the petitioner i.e. SAG, he had been authorized to initiate the ACR because he is the head of the Department/organization at the Divisional Level and the petitioner was reporting to him. The Medical Expert incorporates his views in the ACR of the SAG officers of IRMS as the Reviewing Authority is the CMD. The respondents contended that the genesis of the Resolution dated 28.3.2000 and the Circular dated 3.6.2002 is the DOPT circular dated 10.4.1989 and they are in conformity with it. If the Circular dated 3.6.2002 is bad in law as contended by the petitioner, then her promotion to SAG in terms of the said Circular is also unsustainable.

8. In her rejoinder the petitioner submitted that since she had been promoted to SAG in the year 2002, she would have had the grading "Very Good" in terms of the circular dated 3.6.2002. Thus if in the year 2006, the DPC met to consider her case for promotion to HAG, the DPC would have taken into consideration only three additional ACRs for the years 2003-04, 2004-05 and 2005-06. She states that in the two earlier years i.e. 2002-2003 and 2001-2002 she must have had "Very Good" since she already stood promoted to SAG on that basis. During the years 2003-04 and 2004-05, she had done outstanding work which had been reported to the DG, RHS. Thus even with a "Good" or "Very Good" ACR for the year 2005-06, the total would have come to two "Very Good", two "Outstanding" and one "Good" or "Very Good" thus making the final grading of "Very Good +".

9. We may at this stage take note of a few developments which took place during the pendency of the aforesaid OA before the Tribunal and the orders passed therein. The petitioner had sought interim relief while filing the Original Application before the Tribunal on 13.12.2006. On 14.12.2006, the Tribunal directed that the prayer for interim relief is kept open till the respondents appear. In case of future promotion, the respondents were not precluded from considering the applicant's case if she was otherwise eligible.

10. Thereafter the petitioner/applicant filed another MA. No. 2330/2006 on 18.12.2006. The prayer sought in this application was to "clarify the order dated 14.12.2006 to state that the respondent No. 1 and 2 to consider the applicant's case for future vacancy of CMD(HAG) pending petitions.... This MA No. 2330/06 was taken up by the Tribunal and on 20.12.2006 the order passed by the Tribunal read:

MA 2300/2006

No order need be recorded in the M.A. Accordingly, it is disposed of. List the O.A on 5.1.2007. Issue dasti.

11. The petitioner challenged the order dated 20.12.2006 of the Tribunal by filing W.P(C) No. 210/2007 before this Court. The said petition was taken up for consideration on 10.1.2007. This Court, inter alia, passed the following order:

In so far as the merit of the matter is concerned, the learned counsel for respondent No. 1 and 2, on instructions of the Instructing Officer, states that petitioner's case shall be considered for two vacancies said to arise in January 2007.

List on 8.2.2007. Dasti.

W.P (C) No. 2 10/2007 was disposed of by this Court on 13.2.2007. In the said order, this Court, inter alia, directed "needless to say that a DPC shall be constituted by the respondent according to the DOPT Circular dated 10th April 1989 bearing O.M.No.22011/5/86/Estt(D) and the concerned Resolution of the Railway Board dated 28.3.2000. In this view of the matter, no further orders are called for and accordingly, the writ petition stands disposed of along with CM 365/2007 and CM366/2007.

The fact that the petitioner would have less than one year's service left before her retirement at the time of consideration of her candidature shall not come in the way of promotion, in case she is found fit for the post as the lis was pending prior to this period becoming less than one year.

12. One of the grievances raised by the petitioner before the Tribunal was that despite the aforesaid orders passed by this Court, the respondent authorities had failed to consider the case of the petitioner for promotion to CMD (HAG) in respect of the two vacancies which arose in January 2007. To meet the aforesaid submission of the petitioner, the respondent authorities submitted that the information given to the Tribunal and to the High Court initially, that two vacancies of CMD(HAG) were to arise in January 2007 was factually in- correct. This point was clarified by the official respondents in their pleadings before the High Court itself as follows:

10. That on 10.01.2007, on the instructions of the instructing officer, II. Counsel for Respondent Nos. 1 and 2 had submitted before this Hon''ble Court that the Petitioner's case shall be considered for two vacancies said to arise in January, 2007. The factual position, as can be seen from the submission made above, is that the Petitioner already stands considered both for promotion to HA Grade as CMD against vacancies arising up to 30.06.2007 as well as for the post of CMD by temporarily operating the HA Grade posts in SA Grade. The submission made before this Hon''be Court was without knowledge of the factual position obtaining in the relevant records. Therefore, the deponent tenders unconditional apologies for the same.

13. The respondents further clarified that the Selection Committee/DPC for consideration of cases of IRMS officers to the posts of CMD (HAG) and for posting as CMD(SAG) was held on 10.8.2006 and not on 21.8.2006, as contended by the petitioner.

14. The Tribunal rejected the claim of the petitioner that her seniority has to be counted on the basis of the date of her entry into service. A person substantively

promoted earlier in the higher grade shall necessarily count his/her seniority in that higher grade ahead of those who were promoted later to that higher grade. The claim of the petitioner that she had been superseded by respondent No. 6 Dr. Krishan Kumar was rejected. The Tribunal called for the record of the DPC meeting held on 10.8.2006 and perused the same. The Tribunal found that names of 10 officers were considered by the DPC for filling up ten vacancies in order of seniority as per SAG seniority list dated 12.4.2002. The petitioner made the cut for being considered for promotion in spite of being ranked at serial No. 17 out of 20 persons in the zone of consideration, since seven of her seniors were not considered, as their residual service was less than one year as on 1.7.2006. The petitioner was at serial No. 10. Out of the ten officers who made the cut, only six were finally found "fit" for promotion to the post of CMD (HAG) on the basis of assessment of their performance and upon being graded VG+ by the Selection Committee. The petitioner was one of the four persons who were assessed as "unfit" by the Selection Committee. The Tribunal further observed that as far as the petitioner is concerned, the assessment of her performance/fitness in the years 2001-2002 to 2005-2006 by the DPC is based purely on the grading recorded in the ACRs for that period. In none of the years, the petitioner had been recorded as "unfit" in the ACRs. The primary reason for the petitioner being "unfit" on the whole is that her overall grading has not been found to be "Very Good+" as per the stringent criteria of selection for promotion to HAG prescribed in the Railway Board's Circular dated 3.6.2002. The Tribunal held that the description in para 3.11 of the Brochure on confidential reports, regarding communication of the remarks "not fit" if the officer has been graded as "Good" is with reference to the entries made in the ACRs and has nothing to do with the proceedings of the DPC. The Tribunal also observed that in respect of the petitioner's ACRs, the same had been countersigned by the DG(RHS) before their submission to the Accepting Authority.

15. Before us the submissions of the petitioner are that the circular dated 03.06.2002 issued by the Railway Board laying down the procedure for promotion to HAG from SAG is bad as it is in contradiction with Government of India OM dated 08.02.2002. It is further contended that the circular dated 03.06.2002, which sets out "VG+" as the benchmark is at variance with OM dated 08.02.2002. "VG+" is not defined anywhere. With an undefined "VG+" even five VGs can make the ACR as "VG+". There could be other combinations of Good, Very Good and Excellent, which could result in the grading of "VG+". The combinations without any guideline makes it arbitrary. It is contended that the only permissible benchmark is "VG" as set out in the OM dated 08.02.2002. It is also argued that the OM dated 10.04.1989 prescribes that the DPC shall consist of, inter alia, a technical member and a person familiar with the work of the officers being considered. The resolution dated 28.03.2000 does not fulfill either of these requirements. The resolution dated 28.03.2000 is not in conformity with Government of India OM dated 10.04.1989. It is argued that member (staff) cannot be considered as a technical member since he does not belong to the

medical field. He has not seen the working of the IRMS officers except those who may have attended on him professionally. It is also argued that the respondents have not complied with the order dated 13.02.2007 passed by the Division Bench which directed the consideration of the petitioner's case by the DPC in accordance with OM dated 10.04.1989. It is also submitted that the orders dated 10.01.2007 and 13.02.2007 passed by the Division Bench, as aforesaid, necessitated the consideration of the petitioner's case for promotion to HAG in respect of vacancies arising in January 2007. In spite of the said orders the respondents authorities have not held the DPC and they are in contempt of the orders of the Court. It is argued that DRM could not have adjudged the fitness of the petitioner, as the DRM himself is also in the same grade. In support of this contention reliance is placed on State Bank of India etc., Vs. Kashinath Kher and others, etc., . The petitioner also questions the down grading of the various posts of CMD (HAG) to CMD (SAG). The petitioner has also made a grievance that her representation and other materials were not placed before the DPC; that she had repeatedly been transferred five times in four years while working in SAG but this fact was not brought to the notice of the DPC; that her DRM has failed to write a deserving report for the petitioner during the period 2003-2005. It is stated that there is violation of the wednesbury principle in the proceedings of the DPC. The petitioner also raises an issue of biased attitude of the respondent officials. It is also argued that even the Tribunal has recorded that so far as the petitioner's case is concerned, the DPC was merely guided by the grading given in the ACRs and that it has not given its own grading in terms of paras 10 and 11 of the circular dated 03.06.2002 of the Railway Board. Despite the Tribunal finding the aforesaid lacuna, it did not set aside the consideration of the DPC.

16. Respondent authorities have contended that the impugned order is detailed and reasoned, which considers all the contentions of the petitioner at length. The respondents have defended the placing of respondent No. 6 as senior to the petitioner in the seniority list. It is argued that the job profile of HAG posts includes discharge of administrative functions apart from medical/clinical functions and hence members (staff) is competent to be the part of the DPC as the functional member. The promotions earned by the petitioner to junior administrative grade and above have been considered by the DPC in which no medical officer has been a member. So far as the initiation of the petitioner's ACR by DRM is concerned, it is submitted that the ACRs are written by the immediate reporting officer. The petitioner was reporting in the normal hierarchy to the DRM. It is submitted that in the railways there are instances of officers working in the same grade and one of them acting as the Coordinating Head of Department (CHOD). The Additional Divisional Railway Managers, who are also in SAG report to the DRM, a SAG officer. Therefore, there is nothing wrong in the system prevailing. The ACRs are reviewed and accepted by officers at higher level.

17. Having considered the rival submissions of the parties and perused the

records produced by the respondents, including the consideration of the petitioner's case by the DPC held on 10.8.2006, we are not inclined to interfere with the impugned decision of the Tribunal since the same appears to be correct and we find no merit in this writ petition filed by the petitioner.

18. It appears that the petitioner, to repel the reliance placed by the respondent authorities on the Resolution dated 28.3.2000 and the Circular dated 3.6.2002, contended that these resolutions/circulars were incompetent, being contrary to the DOPT O.M dated 10.4.1989, but the petitioner did not seek to challenge the said resolution and circular dated 28.3.2000 and 3.6.2002 respectively before the Tribunal even though she amended her O.A.

19. The Resolution dated 28.3.2000 of the Railway Board bearing No. E(O)III-93/PM 50 and the circular dated 3.6.2002 also issued by the Railway Board, both deal with the procedure for promotion to Group "A" Railway Services under the Ministry of Railways. The Resolution dated 28.3.2000 purports to lay down the principles and procedure for making appointments to posts in the scale Rs. 22,400-24,500 i.e. the Higher Administrative Grade in various Group "A" Railway Services under the Ministry of Railway. The method of selection laid down by this Resolution, inter alia, reads:

2. Method.

Service-wise panels for appointment for the posts in scale Rs. 22,400-24,500/- in the Zonal Railways/Production Units/Railway Board/RDSO etc. shall be prepared by Selection Committee consisting of Chairman, Railway Board as Chairman, Secretary to the Government of India in the Department of Personnel and Training and functional Member-in charge, Railway Board (or Member, Staff, Railway Board when Chairman, Railway Board is also the functional Member), as Members. The Selection Committee may also recommend the specific type/types of assignments for which a particular officer mentioned in the panel may be considered suitable. The panel, as prepared by the Selection Committee and duly approved by the Minister of Railways, shall be submitted to the Appointments Committee of the Cabinet and after approval specific postings will be ordered by the Ministry of Railways.

The eligibility criteria for appointment to HAG as stated in this Resolution reads as follows:

3. Eligibility Criteria

(a) Officers to be considered for empanelment should have worked in Senior Administrative Grade for a minimum period of five years on regular basis and should be less than 59 years of age on 1st July of the year for which the panel is made as referred to in Para 4 of this Resolution.

(b) Only such of the empanelled officers would be appointed to these posts who had a year or more of service left on the date of occurrence of vacancy falling in their turn.

20. The letter dated 3.6.2002 states that except for consideration for promotion to the HAG, for which provisions of Resolution dated 28.3.2000 shall apply, for other posts in the Administrative Grade the Full Board shall function as the DPC. Therefore for HAG, the DPC continued to consist of "Chairman, Railway Board as Chairman, Secretary to the Government of India in the Department of Personnel and Training and functional Member-in charge, Railway Board (or Member, Staff, Railway Board when Chairman, Railway Board is also the functional Member), as Members."

21. The communication dated 3.6.2002 further states that proceedings of the DPC shall be legally valid and can be acted upon "notwithstanding, the absence of any of its members other than the Chairman". It further states that "each time DPC meets, it can decide its own method and procedure for objective assessment of the suitability of the candidates". The said guidelines contained in the communication dated 3.6.2002 have been issued in order to ensure greater selectivity and for having uniform procedure. All promotions to administrative grades are by selection only. Consequently, mere seniority does not entitle a candidate to be promoted to a position in the administrative grade. Paragraphs 4, 6, 9, 10, 11, 12, 13, 14 and 15 of the circular dated 3.6.2002 are relevant and the same read as follows:

4. While merit has to be recognized and rewarded, advancement in an officer's career should not be regarded as a matter of course, but should be earned by dint of hard work, good conduct and result-oriented performance and potential for shouldering higher responsibilities, as reflected in the Annual Confidential Reports, and it should be based on a strict and rigorous selection process.

6. Confidential Reports are the basic inputs on the basis of which assessment is to be made by the DPC. The DPC will assess the suitability of the officers for promotion on the basis of their service records and with particular reference to the five preceding years.

9. The DPC would not be guided merely by the grading, if any, recorded in the ACRs but should make its own assessment on the basis of the entries in the ACRs, including the various parameters and attributes. The Committee shall also take into account whether the officer has been awarded any major or minor penalty or whether any displeasure of any superior officer or authority has been conveyed to him, as reflected in the ACRs. The DPC should also have regard to the remarks on the columns of integrity.

10. The grading in the ACR represent the assessment of the superior officers during a particular year's performance in general. The overall grading to be assigned by the DPC shall encompass several years' performance and not merely relate with the entries/assessment recorded in the ACRs. It shall be borne in mind that the grading by DPC and in the ACR represent assessment of the officer by two distinct authorities for two different purposes.

11. DPC shall, considering the various factors, assign an overall grading for each

of the officer. The grading shall be one among, "Outstanding", "Very Good+", "Very Good", "Good" and "Unfit".

12. The benchmark for promotion to various grades shall be as under:

(a) From Senior Scale to JAG/SG : Good

(b)SAG : Very Good

(c)HAG : Very Good+

Stringent criteria of selection shall apply for promotion to HAG.

13. While any performance below the benchmarks shall not be termed as adverse in respect of an officer, it only performance above average and is really noteworthy, entitle an officer recognition and suitable rewards in the matter of promotions. For any public servant and more so in higher positions of responsibility, it is expected that he will discharge his duties and responsibilities with best of his capabilities at all times and is not only that in order to achieve some gains in the matter of promotion etc., he would regulate the quality of his performance to that level.

14. DPC shall, for promotion to administrative grades, grade officers as "fit" or "unfit" only with reference to the benchmark mentioned above. Only those who are graded as "fit" shall be included in the select panel prepared by the DPC in order of their inter-se seniority in the feeder grade. There shall be no supersession in the matter of "selection" (merit) promotion among those who are found "fit" by the DPC in terms of the prescribed benchmark.

15. The recommendations of the DPC are advisory in nature and should be duly approved by the appointing authority and where the posts fall within the purview of Appointments Committee of the Cabinet (ACC), approval of ACC shall also be obtained.

22. We may note that though it was the contention of the petitioner that the Resolution and Circular dated 28.3.2000 and 3.6.2002 respectively were contrary to the DOPT OM dated 10.4.1989, in the present writ petition, the petitioner has failed to even place before the Court the said OM dated 10.4.1989 and to state as to why the aforesaid Resolution and Circular are contrary to the said OM of the DOPT dated 10.4.1989. What has been placed on record is Chapter IV dealing with the promotions from Swamy's Master Manual for Drawing and Disbursing officers and heads of offices, Part II Estt. In relation to the composition of DPC, Swamy's Master Manual, states as follows:

1. Composition of DPC - Composition of the DPC is generally indicated in the relevant Recruitment Rules for each category. This may be followed by detailed instructions issued by the departmental authorities. For example, Recruitment Rules may mention "a departmental officer" as a second member. The department may specify the actual grade of such departmental officer. Besides the Chairman who is normally the Head of Office (or other officer at a senior

level as prescribed by the department), and the second member from the department who should be familiar with the work of the departmental candidates concerned, an officer of appropriate level from another department is to be associated as the third member. In the case of technical posts, it is also necessary that the third member from other department has the requisite technical competence. For recruitment to more than 10 vacancies in Group C and Group D categories, it shall be mandatory to have one member belonging to SC/ST and one member belonging to minority community in DPC. Where the vacancies are less than 10 also, no effect should be spared in finding an SC/ST officer and a Minority Community Officer for inclusion in DPC/Selection Committee.

23. From the aforesaid resolution and circular, and the explanation furnished by the respondent authorities it is clear that there is no merit in the grievance of the petitioner that there is insufficient representation in the DPC of medical services to assess the merit and suitability of the officers of IRMS. Like the IRMS there are 8 other organized Group "A" services and it is not possible and necessary that the Railway Board should consist of members hailing from each of these Group "A" services. In fact, there is no member on the Railway Board from IRMS. However, that does not mean that the officers of IRMS are not duly represented in the DPC while considering their cases of promotion to HAG. The member (staff) is in control of, inter alia, the officers of the IRMS. He is a member of the DPC which considers cases of candidates of IRMS for promotion to HAG. Pertinently all the confidential reports sent to the DPC of the officers of IRMS are countersigned by the D.G.(RHS). The D.G.(RHS) and D.G. (RPF) are not members of the Railway Board and they do not have the status of member and ex officio Secretary to Government of India. Therefore, the grievance of the petitioner that the D.G. (RHS) should be a member of the DPC is of no avail. Pertinently the petitioner had no grievance with regard to the constitution of the DPC for consideration of her case for promotion to SAG, even though the said DPC, which consisted of all the members of the Railway Board, had no representative of IRMS or any other member who could be said to be directly conversant with the working of the petitioner apart from the Member (Staff). Even in the said DPC which considered the petitioner's case for promotion to SAG, it was the Member (Staff) who was functional member. It, therefore, does not lie in the mouth of the petitioner to question the competence of the DPC to assess the merit of the candidates for promotion to HAG from amongst IRMS officers merely because she has not been found fit for promotion to HAG. The circular dated 3.6.2002 specifically states that the proceedings of the DPC shall be legally valid acted upon "notwithstanding the absence of any of its members other than the Chairman." Therefore, even if we were to assume that the grievance of the petitioner with regard to constitution of the DPC has some merit, the aforesaid prescription in the circular dated 3.6.2002 renders the grievance unsustainable. Pertinently, while questioning the competence of the DPC to assess her merit for consideration for promotion to HAG, the petitioner

apart from contending that the D.G. (RHS) should be a member of the DPC (which we have already rejected) does not state as to who else from amongst the members of the Railway Board should have been a part of DPC. The reliance placed by the petitioner on Chapter IV dealing with promotions from Swamy's Master Manual does not advance the case of the petitioner. Even if one were to accept that the aforesaid extract from Swamy's Master Manual regarding composition of DPC is founded upon the OM dated 10.4.1989, one has to bear in mind that the said OM is of general application to all the Central Ministries, whereas the aforesaid resolution and circular had been issued by the Railway Board specifically for application to cases of promotion to the administrative grades within the railways. The respondents have also stated that the aforesaid resolution and circular have been issued with concurrence of the DOPT. We find no reason to disbelieve the said assertion of the respondent authorities, particularly, since the petitioner has not produced anything to the contrary. It is also not the petitioner's case that the composition of the DPC and the procedure adopted by it while considering the case of, inter alia, the petitioner for promotion to HAG in its meeting held on 10.8.2006 was different from the composition of the DPC, or the procedure adopted by it, in the earlier years i.e. from 2002-2006.

24. So far as the petitioner's claim for seniority over respondent No. 5 and her supersession by respondent No. 6 is concerned, firstly we may note that the petitioner in spite of amending the original application did not seek the relief of quashing the seniority list circulated on 12.04.2002. Neither did the petitioner prefer a separate original application claiming the said relief. Secondly, the promotion to the HAG being merit based from amongst the officers falling in the zone of consideration, even if one were to accept that the petitioner was senior to Dr. Krishan Kumar in SAG, the same would be of little relevance, as he has been found to meet the benchmark of "VG+" by the DPC and, therefore, "fit" for promotion to HAG whereas the petitioner has been found to be "unfit" for promotion.

25. The contention of the petitioner that in the ACRs the only gradings that can be awarded are "Excellent", "Very Good", "Good" and "Average" and there is no such grading as "VG+" and, therefore, the prescription of the benchmark of "VG+" in the circular dated 03.06.2002 issued by the Railway Board as the benchmark for promotion to HAG from SAG is bad, also cannot be acceptable. Pertinently, the DPC while examining the relevant ACRs is not guided merely by the grading recorded in the ACR, but it has to make its own assessment on the basis of the entries made in the ACR, including the various parameters and attributes. The final grading given in the ACR as Excellent, Very Good, Good etc. is, therefore, of little significance and there is no inconsistency in the procedure devised under the circular dated 03.06.2002 laying down the procedure for promotion to HAG in the railway services. So far as the observation of the Tribunal in the impugned order that the assessment of the petitioner's performance/fitness, for the years 2001-02 to 2005-06 by the DPC is based

purely on the grading recorded in the ACRs for that period is concerned, a perusal of the proceedings of the DPC meeting held on 10.08.2006 shows that the DPC was aware of the fact that it should not be guided merely by the overall grading, if any, that may be recorded with the ACRs, but should make its own assessment on the basis of the entries made in the ACRs because sometimes the overall grading made in the ACR may be inconsistent with the gradings under various parameters and attributes. The DPC was aware of the benchmark for promotion to HAG as being "VG+". The DPC recorded that it did not consider, inter alia, the petitioner as suitable for empanelment to the HAG grade on the basis of her performance and accordingly did not recommend her empanelment in the HAG grade. We do not find any material on the record produced by us to show that the DPC was guided merely by the overall grading given to the candidates in the ACRs which formed the basis of the DPCs assessment. From the file produced by the respondent authorities it is seen shows that the Chairman, Railway Board address a communication dated 22.05.1996 to the Secretary, Department of Personnel, Government of India seeking to make modification in the procedure laid down by the DOPT for promotion from SAG to the Additional Secretary grade. The said communication reads as follows:

Sub: Promotion policy for grade Rs. 7300-7600/- in Railway Services.

As per procedure laid down by DOP benchmark for promotion from SA grade to Additional Secretary grade (Rs. 7300-7600) is "Very Good". For this purpose, Selection Committee is to grade officers who are considered suitable for promotion as "Very Good" or "Outstanding". Officers graded "Outstanding" are placed above those "Very Good" in the Select panel.

2. Ministry of Railways have however decided with the concurrence of Secretary, DOP that minimum benchmark for promotion from SAG to AS grade in Railway services should be "Very Good" and for this purpose an officer should have earned minimum 3 Very Good and 2 Outstanding reports during the last 5 years. A copy of relevant guidelines is enclosed. This procedure has been adopted in Railways for the last several years and panels of grade Rs. 7300- 7600/- framed in various Railways services on this basis have all along been approved by ACC.

3. Board have reviewed the above procedure in their meeting on 17.5.96 and decided that the stipulation that during the last 5 years the officer should have earned at least 3 "Very Good" and 2 "Outstanding" reports is too restrictive and does not allow for aberrations in assessment during a particular year. Therefore, so long an officer's aggregate performance equals 3 "Very Good" and 2 "Outstanding" or 22 points (assigning 5 points to "Outstanding", 4 points to "Very Good", 3 points to "Good" and 2 points to "Average") over the last 5 years, he may be considered for promotion to grade Rs. 7300-7600/- provided he is declared fit for promotion during the last assessment year. Cases of officers who are marginally short of requisite performance benchmark but equal to a performance count of 21 points may however be treated as falling in the "grey area" and fitness of such officers for promotion to grade Rs. 7300- 7600/- may

be considered keeping in view their overall performance and the nature of assignments held by them.

4. As it is proposed to adopt the above policy from the vacancy year 1996- 97, the Department of Personnel and Training are requested to communicate their concurrence to the proposed policy early.

26. The said proposal of the Railway Board was approved by the Secretary, Department of Personnel and Training and the same was communicated to the Railway Board vide communication dated 26.08.1996, which is also to be found on record. Guidelines in selection to the grade Rs. 7300 " 7600 in Group-A railway services were jointly issued by the Secretary, Department of Personnel, Government of India and the Chairman, Railway Board, which reads as follows:

Sub: Guidelines for selection to Grade Rs. 7300-7600/- in Group "A" Railway Services.

The Selection Committee (Chairman, Railway Board, Secretary, DOP and functional Member of Railway Board) met on 02.02.94 to consider claims of SA Grade officers of IRSE and IRSSE for empanelment to grade Rs. 7300-7600/-

2. The Committee noted that the guidelines of DOP in the matter of selection stipulate that DPC should not be guided merely by the overall grading, if any, that may be recorded in the CRs, but should make its own assessment on the basis of entries in the CRs, as the overall grading in CRs may be inconsistent with the grading under various parameters or attributes. The DPC enjoys full discretion to devise their own methods and procedures for objective assessment of the suitability of officers who are to be considered. While merit has to be recognized and rewarded, advancement in an officers' career should not be regarded as a matter of course, but should be earned by dint of hard work, good conduct and result oriented performance based on strict and rigorous selection process.

3. Taking into account the above position, it was decided that the minimum "bench mark" for selection to posts carrying grade Rs. 7300-7600/- on the Indian Railways should be "Very Good +". Accordingly, it was agreed that of the last 5 years ACRs officer should earn minimum 3 "Very Good" and 2 "Outstanding" reports for the purpose of empanelment to Grade Rs. 7300-7600/- in Railways Services.

4. The above guidelines may be placed before future Selection Committee meetings.

27. A perusal of the assessment done by the DPC, inter alia, in respect of the petitioner shows that she had been awarded 19.5 points. Therefore, she failed to make the grade as she did not fall even within the "grey area" count of 21 points in terms of the Railway Boards communication dated 22.05.1996.

28. We also do not find any merit in the submission of the petitioner that there

has been non-compliance of the orders dated 10.1.2007 and 13.2.2007 passed by the Division Bench of this Court in the earlier round of litigation brought by the petitioner to this Court. The respondents have explained that the information given to the Tribunal and to the High Court initially, that two vacancies of CMD (HAG) were to arise in January 2007, was factually incorrect. This aspect had been clarified by the respondents in their pleadings before the High Court itself as extracted hereinabove. That being the position in our view no benefit can be derived by the petitioner on account of the passing of the aforesaid orders by the Division Bench of this Court. The Court had directed the consideration of the petitioner's case by the DPC to be held in January 2007 on the basis that such a DPC was due to be held in January 2007 in respect of two vacancies that were to arise. Pertinently, when the respondents had clarified the position before the High Court, no orders were invited by the petitioner by contemporaneously raising the issue upon the issuance of the said clarification, and she did not press, at the relevant time, for the consideration of her case in January 2007.

29. We also find no merit in the submission of the petitioner that the DRM could not have adjudged the fitness of the petitioner, as he too is in the same grade i.e. SAG, as the petitioner. The petitioner was reporting to the DRM. It is pointed out by the respondents without it being controverted by the petitioner, that there are numerous instances where one of the officers, working in the same grade as others who are reporting to him, acts as the Co-ordinating Head of the Department (CHOD). In such situations, the ACRS are initiated by the CHOD. As pointed by the respondent, additional DRMS, who are also in SAG report to the DRM who is also an SAG officer. The DRM initiates the ACR which are reviewed and accepted by officers at higher levels. The submission that there was a bias against the petitioner amongst the various officials of the respondent Railways on account of the petitioner being a strict task master cannot be accepted as the same is unsubstantiated. The petitioner has relied upon the following decisions:

1. Taradas Dutt and Another Vs. Administrative Officer of the Corporation of Calcutta and Another, .
2. Advocate-general, State of Bihar Vs. Madhya Pradesh Khair Industries and Another, .
3. Lt. Col. K.D. Gupta Vs. Union of India (UOI) and Others, .
4. Major Genl. B.M. Bhattacharjee (Retd.) and another Vs. Russel Estaqte Corporation and another, .
5. State Bank of India etc., Vs. Kashinath Kher and others, etc.,,
6. Sh. J.S. Garg Vs. Union of India (UOI) and Others,
7. Badrinath Vs. Government of Tamil Nadu and Others,
8. S.K. Verma Vs. Chairman, International Airport Authority,
9. Comptroller and Auditor-general of India, Gian Prakash, New Delhi and

Another Vs. K.S. Jagannathan and Another,

30. However, we do not find how any of these decisions advance the case of the petitioner. The decisions in Tara Das Dutt (*supra*), M.P. Khair Industries (*supra*), Lt. Col. K.K.D. Gupta and Major General Bhattacharjee (*supra*) are decisions dealing with the aspect of contempt of Court. These are relied upon in view of the statement made by the respondents in the earlier writ proceedings initiated by the petitioner. In our view, these decisions have no applications since the earlier statement made by the respondents was a mere error. Had the statement not been made, in our view the petitioner could not have pressed for any further relief in those proceedings. Moreover, we are not dealing with a contempt petition, which could have been preferred by the petitioner if he was so advised for alleged non-compliance of the earlier orders passed by the Division Bench. No doubt the decision in the case of Kashinath Kher (*supra*) relied upon by the petitioner holds that it is improper for officers in the same rank to initiate the confidential report of an employee. However, the Supreme Court was not considering a situation where the concerned employee was reporting to the employee who initiates the ACR. That was a case where both, the employee whose ACR was initiated and the employee who initiated the ACR were reporting to a third superior officer. This is evident from the opening sentence in Para 15 of the judgment which reads:

15. It would appear that the confidential reports and character rolls are being prepared by the officers of the same rank in the same MMGS-II working in the establishment department over the same cadre officers working elsewhere and the reporting officers are the same....

31. Since in the present case, the ACR initiated by the DRM who is the CHOD and to whom the petitioner was reporting is reviewed at still higher levels, in our view, the decision in Kasinath Kher (*supra*) does not come to the rescue of the petitioner. Pertinently even according to the petitioner, the DRM is a non medical officer. Consequently there would be no conflict of interest between the DRM and SAG officers of the IRMS. The decision of this Court in J.S. Garg (*supra*) in our view is of no avail, since the present is not a case of the petitioner being down graded while writing her ACRs. The DPC was required to make its own assessment on the basis of the entries in the ACRs and not to be guided by the final grading given in respect of the various candidates in their respective ACRs. For the same reason, the decision of the Supreme Court in Badrinath and S.K. Verma (*supra*) in our view has not application in the facts of this case. The decision in K.S. Jagannathan (*supra*) also in our view has no relevance in the facts of this case.

32. For the reasons aforesaid, we dismiss this writ petition leaving the parties to bear their respective costs.